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IN THE

Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., *et al.*,

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE ENVIRONMENTAL DEFENSE IN SUPPORT OF RESPONDENTS

MICHAEL J. BEAN
Counsel of Record
JAMES T.B. TRIPP
ISABELLE SILVERMAN
J. CULLEN HOWE
Environmental Defense
257 Park Avenue South
New York, New York 10010
(212) 505-2100

Counsel for Amicus Curiae

205266

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Environmental Defense is a leading national nonprofit organization representing more than 500,000 members nationwide. Since its founding in 1967, Environmental Defense has linked science, economics and law to create innovative, equitable and cost-effective solutions to society's most urgent environmental problems. Environmental Defense is dedicated to assuring that all people, including future generations, enjoy clean air, clean water, healthy food and flourishing ecosystems. Environmental Defense is guided by scientific evaluation of environmental problems, and the solutions it advocates are based on science.

Pursuant to its mission, Environmental Defense is interested in municipal waste management plans that emphasize recycling and waste reduction and promote transport of waste and recyclables by water or rail, rather than by truck, in urban areas where these options are available in order to reduce urban traffic congestion, minimize negative air quality impacts, and otherwise serve human health and environmental purposes. Because government entities are able to take environmental considerations into account in devising their solid waste management strategies, they are often in the best position to design and implement environmentally responsible solid waste management systems. Environmental Defense supports the waste

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[1] Pursuant to this Court's Rule 37.6, no portion of this brief was authored by counsel for a party, and no person or entity other than the *amicus curiae* has made a monetary contribution to the preparation or submission of this brief. The Petitioners and the Respondents have both consented to the filing of this brief and their respective letters of consent have been filed with the Clerk of the Court.

management plan at issue here because it provides many tangible environmental and air quality benefits to the residents in Oneida and Herkimer Counties (the "Counties"). Most importantly, the flow control regulations are essential to the Counties' successful implementation of their waste management plan. Many other municipalities, such as New York City, could reduce the environmental burdens of their waste system if they could exercise increased control over the flow of commercial sector waste.

SUMMARY OF ARGUMENT

The United States produces almost 250 million tons of trash per year, the vast majority of which is put into landfills. Many communities, particularly urban ones such as New York City, have reached the point where they have to transport their waste hundreds of miles so it can be put into landfills with available capacity. While this has resulted in a thriving waste transport business, it has led to a dependency on truck-based means of transporting this waste, with little municipal control over the emissions from private sector trucks, most of which pre-date any effective federal regulations, exacerbating traffic congestion and air pollution. Municipalities like New York City have an interest in fostering a solid waste system that minimizes air pollution and traffic congestion. Flow control is one of the most effective ways of accomplishing these goals.

The purpose of this brief is not to add to the legal arguments of respondents and other amicus parties that support the position of the respondents that the Second Circuit in *United Hauler Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 438 F.3d 150 (2nd Cir. 2006) ("United Haulers II") correctly applied the

balancing test that this Court enunciated in *Pike v. Bruce* Church, 397 U.S. 137 (1970) in analyzing the respondents' flow control regulations. Under this test, courts will uphold a challenged regulation unless it places a burden on interstate commerce that is clearly excessive when compared to the putative local benefits. While, in our view, the Second Circuit's analysis is sound, and the challenged regulations do not treat similarly situated in-state and out-of-state business interests differently, the purpose of this brief is to highlight the very significant environmental and environmental justice benefits that can be derived through properly designed municipal flow control programs.

The Second Circuit held that such local benefits included a waste management system that encourages waste volume reduction, recycling and reuse and ensures the proper disposal of hazardous waste. Environmental Defense submits this amicus brief in support of respondents because, whether the Court applies the *Pike* balancing test or any more stringent standard to the challenged regulations, it is vitally important that it consider the full measure of environmental benefits that they provide to the Counties' residents, and the benefits that similarly enacted flow control regulations can provide to residents in other communities.

The flow control provisions at issue here are an integral part of the waste management plan implemented by Oneida-Herkimer Solid Waste Management Authority (the "Authority"). They provide for maximum levels of waste reduction and recycling. To this end, the regulations require that waste generators separate their recyclable material and make it available for delivery to the Authority. Non-recyclable waste is brought to the Authority's transfer station. It is first inspected to ensure that it does not contain any hazardous

waste and it is then transported to its ultimate disposal site by a contractor chosen by the Authority. These regulations are consistent with both federal and state policy concerning waste disposal.

By encompassing these state and federal policies, the regulations provide numerous benefits to the Counties' residents, including minimizing the amount of waste that is hauled by trucks, thereby reducing the amount of diesel fuel that the Counties' residents are exposed to; providing reliable waste management service while protecting the public health, safety and welfare; replacing high volume, undifferentiated waste disposal methods with a system that matches the best management method to each component of solid waste; making waste reduction and recycling legally mandated top priorities for solid waste management; establishing and expanding markets for recyclables; and conserving vital natural resources.

The regulations provide many environmental, economic and social benefits. Since 1989, the Counties' recycling rate has increased fourfold. Over the last seventeen years over, 700,000 tons of materials have been recycled. Approximately 50% of all solid waste collected by the Authority is recycled instead of being landfilled. Of this amount, over 370,000 tons of recyclable material have been processed and sold, generating millions of dollars for the Authority's solid waste management system. It has also ensured the proper and safe disposal of hazardous waste. Finally, because a portion of this recycled material is sold, the regulations have realized the additional benefit of reducing the extraction of natural resources.

The respondents' flow control regulations also provide significant air quality and health benefits for the Counties' residents because they minimize the number of trucks used to transport waste, and reduce the number of miles traveled by each truck, because solid waste is disposed of locally. Most garbage trucks run on diesel fuel, and it is well documented that diesel emissions are harmful to human health and contribute substantially to local air pollution. Diesel exhaust is a major contributor of the cancer risk from air toxins in the United States. Exposure to diesel exhaust can also contribute to short and long-term health hazards, such as asthma, cardiovascular and respiratory problems, strokes, heart attacks, lower birth weight and even premature death.

ARGUMENT

I. THE PROBLEM OF WASTE DISPOSAL IN THE UNITED STATES

According to the United States Environmental Protection Agency, from 1960 to 2005, the total amount of municipal solid waste generated annually in the United States increased from 88 million tons to 245.7 million tons, slightly less than one ton of trash for each American. *See* Office of Solid Waste, U.S. Envtl. Prot. Agency, *Municipal Solid Waste in the United States: 2005 Facts and Figures* 1-2 (2006), *available at http://www.epa.gov/epaoswer/non-hw/muncpl/msw99.htm.* This averages to approximately 4 ½ pounds of trash per person per day. Although some of this waste is recycled, the vast majority of it is put into landfills. While the per capita generation rate of municipal solid waste is slowly leveling off, the total amount of solid waste that must be disposed of each year continues to increase. *See id.* Unless innovative

approaches such as the Authority's are adopted, continual construction and expansion of landfill capacity will be needed, which in turn steadily increases the consumption of land for disposal.

Many communities, particularly high density urban areas such as New York City, have reached the point where they do not have the facilities to dispose of their solid waste locally and must therefore transport the vast majority of it hundreds of miles so it can be put in landfills with available capacity. While this has resulted in a thriving waste transport business, it has led to most commercial waste in New York City being transported by private charter collection trucks to land-based transfer facilities concentrated in low-income communities and then exported to out-of-state facilities via private firm, long-haul trucks. Since most of these privately operated trucks have been in use for years and will be in use for many more years, their diesel emissions are not effectively regulated. This truck dependency exacerbates road congestion and air pollution. It also negatively impacts the health of residents in communities where these facilities are located. In New York City hundreds of garbage trucks are clogging already congested streets. It is not uncommon to see garbage trucks from several different commercial waste haulers service businesses on the same street. Municipalities such as New York City have an interest in fostering a solid waste system that minimizes air pollution and traffic congestion by, among other things, encouraging marine or rail transport as a way of reducing waste truck vehicular miles traveled. Flow control is one of the most effective ways of accomplishing these environmental and social goals.

Because environmental concerns are an inherent part of waste creation and disposal, it is appropriate for municipal

governments to assert control over waste created in their community, and flow control is an essential tool in ensuring that this waste is disposed of in an environmentally responsible manner.

II. THE COMPONENTS OF THE COUNTIES' FLOW CONTROL REGULATIONS

The flow control provisions at issue here were included in Oneida County Local Law #1 of 1990 and Herkimer County Local Law #1 of 1990 (the "Regulations"). Pet. App. 118a-130a (Oneida County Ordinance), 131a-143a (Herkimer County Ordinance). They are an integral part of the comprehensive waste management plan implemented by the Authority, a public benefit corporation created in the late 1980's. In general, the Regulations establish fundamental responsibilities for each citizen, waste generator, municipality and hauler. To this end, they "provide for maximum levels of waste reduction and recycling, coupled with the development of environmentally and economically sound programs and facilities for the remainder of the waste stream." JA144a.

A primary component of the Regulations is recycling and waste reduction. The Regulations require both waste source separation by waste generators and delivery of these segregated materials to various county-designated public facilities by all public and private waste haulers. By charging for the disposal of solid waste, while accepting recyclables at no cost, the Regulations concomitantly encourage waste reduction and recycling. They also provide funding for a wide range of waste reduction, recycling facilities and programs.

The Regulations require that every waste generator (citizens, businesses, etc.) provide for the proper disposal of all waste that they generate by requiring them to separate recyclable from non-recyclable waste before collection by waste haulers. Although waste generators may have recyclables sent directly to a buyer outside of the Authority's system, if they do not make such an arrangement, they must place recyclables at the curbside for delivery to the Authority. JA 358a.

The Regulations further mandate that private haulers deliver all acceptable non-recyclable materials and all curbside recyclables generated within the Counties to the Authority's recycling facility. Once the recyclables are delivered to the facility, they are processed and ultimately sold to buyers all over the world. The Authority recycles 33 types of waste products, many of which are not commonly recycled by other public or private waste management programs. JA 378a-79a.

Nonrecyclable waste is brought to the Authority's transfer stations. The waste is inspected to ensure that it does not contain any dangerous or hazardous materials and to ensure that haulers and generators comply with the Regulations' recycling requirements. Following the inspection, the waste is consolidated to facilitate transportation to its ultimate disposal site by a contractor chosen by the Authority through an open, competitive bidding process. To ensure that this waste is disposed of in an environmentally responsible manner, the Authority has, in the past, selected a contractor that demonstrates "the requisite experience and skill in the necessary technologies, and propos[es] a plan that provides the most cost-effective

method of disposing of solid waste with maximum protection of human health and the environment."[2] JA 359a.

The Regulations are consistent with both federal and state policy concerning solid waste disposal. The Resource Conservation and Recovery Act ("RCRA"), states that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies." 42 U.S.C. § 6901(a)(4) (2000). Although RCRA establishes national solid waste goals and standards, it places primary responsibility on the States to develop solid waste management plans that promote recycling, energy recovery, resource conservation, and environmentally sound disposal methods. 42 U.S.C. § 6943(b). Consistent with RCRA's mandate, New York State has established four statewide management priorities with regard to solid waste: (1) reduce the amount of solid waste generated; (2) reuse material for the purpose for which it was originally intended or recycle material that cannot be reused; (3) recover, in an environmentally acceptable manner, energy from solid waste that cannot be economically and technically reused and recycled; and (4) dispose of solid waste that is not being reused, recycled or from which energy is not being recovered, by land burial or other methods approved by the department. N.Y. Envtl. Conserv. Law § 27-0106(1) (McKinney 2006). The Regulations are consistent with these federal and state policies.

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[2] As of October 24, 2006, the Authority's solid waste landfill, located in Oneida County, was completed and began receiving waste. Starting January 1, 2007, all non-hazardous, non-recyclable waste from the Counties will be landfilled there. Resp. Br. at 1.

III. THE RESPONDENTS' FLOW CONTROL REGULATIONS PROVIDE A WIDE ARRAY OF IMPORTANT HEALTH AND ENVIRONMENTAL BENEFITS TO THE RESIDENTS OF ONEIDA AND HERKIMER COUNTIES.

The flow control Regulations provide numerous environmental benefits to the residents of Oneida and Herkimer Counties. Such benefits include minimizing the amount of waste that is hauled by trucks, thereby reducing the amount of diesel fuel that the Counties' residents are exposed to; providing reliable waste management service while protecting the public health, safety and welfare; replacing high volume, undifferentiated waste disposal methods with a system that matches the best management method to each component of solid waste; making waste reduction and recycling legally mandated priorities for solid waste management; establishing and expanding markets for recyclables; and conserving vital natural resources.

A. The Counties' Flow Control Regulations Provide Important Environmental and Health Benefits to the Residents of Oneida and Herkimer Counties.

In addition to reduced exposure to diesel emissions, the respondents' flow control regulations have resulted in other important environmental, economic and social benefits to the residents of Oneida and Herkimer Counties.

First and foremost, the Regulations benefit the Counties' residents by creating a comprehensive waste management system that matches the best management method to each component of solid waste while making waste reduction and recycling legally mandated priorities.

Together, the Counties produce approximately 300,000 tons of waste each year. Since 1988, when the Authority was created, it has reliably and safely disposed of over 2.3 million tons of solid waste generated in the Counties. Since the opening of the Authority's recycling facility in 1991, it has removed over 700,000 tons of material from the waste stream through recycling, or approximately one-third of the total amount of solid waste generated. Of this amount, over 370,000 tons of recyclable material has been processed and sold, yielding more than $13 million in revenue, and conserving approximately two years of landfill capacity. The avoided cost of landfilling this recyclable material at $55/ton is over $20 million. Since 1992, the Authority has received and composted over 180,000 tons of yard debris, and made over 50,000 cubic yards of compost and mulch available to the Counties' residents. The avoided cost of landfilling this material, at $55/ton, is over $7.5 million. JA 359a.

Moreover, because the Counties charge "tipping fees" for the collection and disposal of nonrecyclable waste but do not charge such a fee for recyclables, the Regulations provide a strong economic incentive for waste creators to comply with the recycling mandate. These economic incentives encourage residents, businesses and haulers to find innovative ways to reduce the amount of waste they generate. For example, higher tipping fees have provided an incentive for large waste generators in the Counties, such as hotels and industrial facilities, to seek out waste reduction and recycling opportunities. The Authority has assisted such efforts. JA 381a-82a.

The Authority's recycling facility also provides the benefit of ensuring the proper and safe disposal of hazardous

waste. Since 1993, the facility has received and safely disposed of or recycled over 260,000 gallons of liquid hazardous waste, including paint, pesticides, pool and photographic chemicals, oil, antifreeze, and batteries. JA 359a-60a. By properly screening all waste that comes into the facility, the Authority ensures that all liquid and hazardous waste is disposed of in a manner that provides maximum protection of human health and the environment. The benefits of proper disposal of such waste are obvious. The safe disposal of hazardous waste was the impetus behind the creation of the Authority in the 1980's, when state health officials closed drinking water wells near several dump sites in the Counties, twelve of which were ultimately identified as hazardous waste disposal sites by state and federal authorities, and one of which was named to the National Priorities List (Superfund). Resp. Br. at 3-4.

Finally, the Regulations have realized an additional benefit, the reduced extraction of natural resources. Most of the recyclables are sold to companies that use the recyclable materials as feedstock to manufacture new products, thereby replacing the use of virgin materials in the manufacturing process.

B. The Respondents' Flow Control Ordinances Benefit the Counties' Residents By Reducing Their Exposure to Diesel Emissions.

The respondents' flow control measures also provide important air quality and health benefits for the Counties' residents because the regulations' recycling requirements reduce the amount of waste that is ultimately landfilled. Flow control has further allowed the Counties to site their landfill within their borders. Thus, the Regulations have the effect

of both minimizing the number of trucks used to transport waste and reducing the number of miles traveled by each truck, thereby reducing the Counties' residents' exposure to harmful diesel emissions.

Most garbage truck engines run on diesel fuel. Often, diesel garbage trucks, which can stay in use for decades, have very old, highly polluting engines. It is well documented that diesel emissions are harmful to human health and contribute substantially to local air pollution. Several organizations, including the Environmental Protection Agency (EPA), have designated diesel exhaust as a probable or potential human carcinogen. Diesel exhaust is a major contributor of the cancer risk from air toxins in the United States. Office of Research and Dev., U.S. Envtl. Prot. Agency, Publ'n No. EPA/600/8-90/057F, *Health Assessment for Diesel Engine Exhaust*, p. 1-1 (2002), *available at http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=29060*. Studies show that concentrations of toxic pollutants, such as diesel emissions, in neighborhoods near heavily traveled highways, are significantly higher than normal, producing a cancer risk as high as 1 in 130 in some areas. Comm. on Envir. Health, Am. Acad. of Pediatrics, *Ambient Air Pollution: Health Hazards to Children*, 14 Pediatrics 1699, 1702-1707 (2004), *available at* http://pediatrics.aappublications.org/cgi/content/full/114/6/1699#R5.

For residents of Oneida County, the lifetime cancer risk from diesel soot exceeds the combined risk of all other air toxics tracked by the EPA. For these residents, the average lifetime diesel soot cancer risk is 155 times greater than EPA's acceptable cancer level of 1 in a million. Compared to other counties nationwide, Oneida County's citizens have a considerably above-average cancer risk. Clean Air Task

Force, *Diesel Soot Health Impacts: Oneida County, New York, available at http://www.catf.us/projects/diesel / dieselhealth/county.php?c=36065&site=0* (using the approved health impact modeling methodology of the EPA). For residents of Herkimer County, the average lifetime diesel soot cancer risk is 130 times greater than the EPA's acceptable cancer level. *Id.* Notably, Oneida and Herkimer Counties comply with the federal health-based ozone and $PM_{2.5}$ standard. In counties that are in non-attainment for those pollutants, the average diesel soot cancer risk is even higher. Those counties, especially, should not be further burdened with unnecessary long-haul diesel trucks.

Besides cancer, exposure to diesel emissions significantly contributes to short and long-term health hazards, such as asthma, cardiovascular and respiratory problems, strokes, heart attacks, lower birth weight and even premature death. Office of Research and Dev., U.S. Envtl. Prot. Agency, Publ'n No. EPA/600/8-90/057F, *Health Assessment for Diesel Engine Exhaust*, p. 1-1 (2002), *available at* http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=29060. Nationwide, EPA has estimated that diesel pollution is the leading cause of thousands of instances of premature mortality, hundreds of thousands of asthma attacks, millions of lost work days, and numerous other health impacts. Envt'l Prot. Agency, *Clean Diesel Campaign*, http://www.epa.gov/diesel (last visited Dec. 2, 2006). Many epidemiological studies have documented the serious health threats associated with exposure to fine particulate matter ($PM_{2.5}$) – otherwise known as black soot. With respect to $PM_{2.5}$, EPA has determined that "[t]he range of health outcomes linked with fine particle exposures is also broad, including effects on the cardiovascular and respiratory systems, and potential links

with developmental effects in children (*e.g.*, low birth weight) and death from lung cancer." *National Ambient Air Quality Standards for Particulate Matter; Proposed Rule, 71 Fed. Reg. 2620, 2627 (January 17, 2006). See also National Ambient Air Quality Standards for Particulate Matter; Final Rule,* 71 Fed. Reg. 61144, 61151 (October 17, 2006). In addition, diesel engines emit nearly 40 toxic substances, including carbon monoxide, smog-forming nitrogen oxides and hydrocarbons.[3]

As mentioned above, diesel pollution is a known trigger for asthma attacks. The New York State Department of Health has found that asthma is a serious public health problem in New York State and the nation. Children are especially at risk because they breathe at a faster rate – in New York State over 250,000 children suffer from asthma. Asthma caused an average of 358 deaths per year in New York during the period 1998-2000, including 12 deaths per year in children under 14 years of age. In addition, New York residents had an average of 42,725 asthma hospitalizations per year during the period 1998-2000. Total Medicaid health care expenditures for recipients with asthma in New York State exceeded $1 billion in fiscal year 2000. N.Y. State Dep't of Health, *EPSD/CTHP Provider Manual for Child Health*

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[3] Diesel fuel emissions also produce approximately 22% of the 1,958 million metric tons of carbon dioxide (CO_2) released by the transportation sector. Energy Info. Admin., U.S. Dep't of Energy, Publ'n No. DOE/EIA-0573, *Emissions of Greenhouse Gases in the United States 2005* (2005), *available at* http://www.eia.doe.gov/oiaf/1605/ggrpt/index.html. Such CO_2 emissions, in turn, constitute the dominant man-made greenhouse gas associated with climate change. U.S. Dep't of State, *U.S. Climate Action Report 2002*, 27-30, Fig. 3-1, Table 3-1 (2002), *available at* http://www.gcrio.org/CAR2002/car2002ch3.pdf.

Plus 81 (2005), *available at* http://www.emedny.org/ProviderManuals/EPSDTCTHP/PDFS/EPSDT-CTHP.pdf.

The Counties' flow control measures also provide important air quality benefits to people living and working in counties where diesel long-haul trucks, carrying solid waste from the Counties, pass through on their long journey to out-of-county landfills such as landfills in Virginia or Pennsylvania. Long-haul diesel trucks on their way to landfills in Pennsylvania or Virginia could travel through counties in New York, New Jersey, Delaware, Maryland, the District of Columbia and Pennsylvania. This region is already struggling with bad air quality and many counties of those states are in non-attainment with federal health-based air quality standards for fine particle matter ($PM_{2.5}$) and ground-level ozone standards. EPA Regions 2[4] and 3[5] have a total of 158 counties containing millions of people that are in non-attainment with the federal health-based ozone standard and 80 counties that are in non-attainment with the federal health-based fine particle ($PM_{2.5}$) standard. Office of Air Quality and Prot. Standards, Envt'l Prot. Agency, *8-Hour Ground-level Ozone Designations: Region 2: State Designations* (2004), http://www.epa.gov/ozonedesignations/regions/region2desig.htm (last visited Dec. 5, 2006) (showing Region 2 ozone non-attainment counties); Office of Air Quality and Prot. Standards, Envt'l Prot. Agency, *8-Hour Ground-level Ozone Designations: Region 3: State Designations* (2004),

[4] EPA Region 2 is comprised of New York, New Jersey, Puerto Rico, and the Virgin Islands. *See* Envt'l Prot. Agency, *About EPA: Regions*, http://www.epa.gov/epahome/locate2.htm (last visited Dec. 5, 2006).

[5] EPA Regions 3 is comprised of Pennsylvania, Maryland, the District of Columbia, Delaware, Virginia and West Virginia. *See id.*

http://www.epa.gov/ozonedesignations/regions/region3desig.htm (last visited Dec. 5, 2006) (showing Region 3 ozone non-attainment counties); Office of Air Quality and Prot. Standards, Envt'l Prot. Agency, *Fine Particle (PM 2.5) Designations: Region 2: State Designations* (2004), http://epa.gov/pmdesignations/regions/region2desig.htm (last visited Dec. 5, 2006) (showing Region 2 $PM_{2.5}$ non-attainment counties); Office of Air Quality and Prot. Standards, Envt'l Prot. Agency, *Fine Particle (PM 2.5) Designations: Region 3: State Designations* (2004), http://epa.gov/pmdesignations/regions/region3desig.htm (last visited Dec. 5, 2006) (showing Region 3 $PM_{2.5}$ non-attainment counties).

Hence, the Counties' flow control measures will provide an additional benefit of eliminating thousands of miles unnecessarily traveled by polluting diesel long-haul trucks inside and outside the Counties' borders.

CONCLUSION

For the foregoing reasons, the decision of the Second Circuit should be affirmed.

Respectfully submitted,

MICHAEL J. BEAN
Counsel of Record
JAMES T.B. TRIPP
ISABELLE SILVERMAN
J. CULLEN HOWE
Environmental Defense
257 Park Avenue South
New York, New York 10010

Counsel for Amicus Curiae